No. 94-590

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

VERNONIA SCHOOL DISTRICT 47J,
Petitioner,

v.

WAYNE and JUDY ACTON,
guardians ad litem for JAMES ACTON,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONER VERNONIA SCHOOL DISTRICT 47J

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STATEMENT PURSUANT TO RULE 29.1

Petitioner is not a corporation and has no parent companies, subsidiaries or affiliates.

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REPLY BRIEF OF PETITIONER VERNONIA SCHOOL DISTRICT 47J

I. THIS COURT SHOULD ACCEPT THE CONCURRENT FINDINGS

The Actons challenge the district court's findings of fact on sufficiency and hearsay grounds and urge this Court to reject the findings. However, findings of fact "shall not be set aside unless clearly erroneous." Fed. R. Civ. P. 52(a). When, as here, a court of appeals finds no clear error in a district court's findings, 23 F.3d 1514, 1519 (Pet. App. A at 20a), the findings of the two courts are concurrent. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987). "This Court cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Id.*[1]

The Actons essentially argue that the only evidence the District could rely upon in deciding it had a drug problem was direct observation of drug use. They also suggest that the District's conclusion that a serious drug problem existed was based on "unconfirmed, second hand reports of off-campus drug use, almost all of it hearsay or hearsay within hearsay." (Resp. Br. at 3). The court of appeals rejected an assignment of error to that effect. 23 F.3d at 1519 (Pet. App. A at 20a). In addition, there is adequate evidence of a drug problem irrespective of the so-called "hearsay," including: (1) direct observations of "actions of athletes and others that were so far out of the norm that drug use was a logical inference," *id.* (Pet. App. A at 19a); (2) direct observations of students using and glorifying drugs; (3) testimony that athletes wrote class assignments admitting and glorifying drug use; and (4) actual arrests of athletes for drug use. (J.A. 46-47, 49-

[1] The Actons note that the court of appeals made some additional comments on the facts after finding no clear error. A court of appeals cannot undermine the legal effect of its finding of no clear factual error simply by recharacterizing the facts in its opinion.

50, 63-64).[2] While none of the Actons' witnesses (not even James Acton) denied that a serious drug problem existed in the District, the Actons single out and criticize each fact relied upon by the District as if each must be sufficient by itself to establish a drug problem. The determination of a drug problem, however, was based not on any one fact, but on the numerous facts and circumstances shown at trial.

More direct evidence of a drug problem exists here than in *Skinner v. Railway Labor Exec. Ass'n*, 489 U.S. 602 (1989) or *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). In *Skinner*, the Court relied on findings of drug use by railroad employees nationally, without specific proof that each railroad whose employees would be tested had a problem. 489 U.S. at 607. In *Von Raab*, the Court relied entirely on possibilities, without evidence of any actual problem in the Customs Service. 489 U.S. at 683 (Scalia, J., dissenting). By contrast, the District established a serious drug problem in the very same locale where testing occurred. (Pet. Br. at 4-7; Def. Ex. 105). Such proof is more than the Court required in either *Skinner* or *Von Raab*.

II. THE ACTONS MISSTATE OR MISCHARACTERIZE SOME FACTS

The Actons' brief contains several mischaracterizations of the record evidence. The Actons suggest that the smell of marijuana in the wrestler's hotel room was the sole basis for the coach's concern that the injury was drug related. The coach also considered that the injury resulted from the wrestler's failure to execute a protective move

[2] The district court admitted and the court of appeals also considered evidence based on the reports of others, which the Actons claim both courts should have rejected. For example, Principal Aultman testified that students admitted using drugs to him and that the football coach told him that athletes had admitted drug use. (J.A. 22-24). As the court of appeals noted, Vernonia teachers and administrators "were told of incidents by others who were concerned and had no reason to lie." 23 F.3d at 1519 (Pet. App. 19a-20a).

he had practiced "probably a thousand times" and that he "didn't react like he had reacted a hundred times in the past." (J.A. 55-56).

The Actons claim only one witness testified to the need for mass expulsions and that his conclusion was "hyperbole." That witness, Principal Aultman, testified that he discussed mass expulsions with his staff, but they rejected that alternative because expelling students does not solve the problem (J.A. 26-27). No basis exists in the record for concluding that Mr. Aultman's statement was hyperbole.

The Actons suggest the District rushed into the testing program, "impatient for immediate results." (Resp. Br. at 1). In fact, the District's efforts to combat drug use prior to implementing the Policy—including classes, speakers and the like—spanned several years. (J.A. 25-26, 49, 63).

The Actons say that athletes were not required to give a urine sample as part of the pre-season physical examination. (Resp. Br. at 35). The evidence demonstrates that a physical exam was required, that James Acton took such an exam and that he provided a urine sample as part of the required physical. (J.A. 17; R. 61-62). Unless James Acton offered to give a sample, the only reasonable inference is that giving a urine sample was part of the required physical.

Finally, contrary to the Actons' assertion, the evidence shows that at the same time school officials noticed a drastic increase in drug use by students, including athletes, the frequency and severity of athletic injuries also increased. (J.A. 39). After the Policy was implemented, classroom decorum improved drastically and athletic injuries decreased. (J.A. 43, 50).

"what is reasonable [for Fourth Amendment purposes] depends on the context within which a search takes place," *T.L.O.*, 469 U.S. at 337, and because the context here is a public school, *T.L.O.* cannot be ignored.

The school setting demands "some easing of the restrictions to which searches by public authorities are ordinarily subject" and maintenance of order in schools requires "a certain flexibility in school disciplinary procedures." 469 U.S. at 340. The essence of *T.L.O.* is that "the balance between the schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place," 469 U.S. at 340, tilts in favor of maintaining discipline and order. The interests of students may be invaded only to the extent "necessary to achieve the legitimate end of preserving order in the schools." *Id.* Just as *Skinner* allowed the Government to take "all necessary and reasonable regulatory steps to prevent or deter [performance of sensitive tasks while drug impaired]", 489 U.S. at 633, educators may take all reasonable steps to preserve order and protect their student athletes.

Drug use by students in the District created two significant problems: (1) athletes were endangering their safety and the safety of others on the playing field; and (2) the student body was in "a state of rebellion." 796 F.Supp. 1354, 1357 (Pet. App. B at 85a-86a). The District was entitled to take reasonable measures necessary to regain discipline and order in the school and, due to the government's "heightened obligation to safeguard students whom it compels to attend school," to protect the safety of its athletes. *T.L.O.*, 469 U.S. at 353 (Blackmun, J., concurring). This Court need not decide

urinalysis, in the abstract, "intrudes upon expectations of privacy that society has long recognized as reasonable," *Skinner*, 489 U.S. at 617, such an intrusion can be minimal as to those who "reasonably should expect effective inquiry into their fitness and probity." *Von Raab*, 489 U.S. at 672. Finally, deterrence is a valid goal of a drug testing program and a low incidence of positive tests establishes its success, rather than denying the existence of a problem. *Von Raab*, 489 U.S. at 672-673, n.3.

III. THIS CASE SHOULD NOT BE REMANDED TO THE COURT OF APPEALS

The Actons' complaint alleged violations of both the federal and state constitutions. (J.A. 5-6). The court of appeals noted that the Oregon courts have never decided a random drug testing case, leaving the court of appeals "without a compass that clearly points us in the right direction unless we use a federal compass." 23 F.3d at 1518 (Pet. App. 16a). Consequently, it "decide[d] the case based on federal law, confident . . . that Oregon would do no less." 23 F.3d at 1519 (Pet. App. A at 17a-18a). If this Court holds the Policy does not violate the Fourth Amendment, it should reverse rather than remand. The court of appeals was required to rely on the federal constitution when it decided this case. Because Oregon still has not decided a random drug testing search case, the court of appeals would be required to do the same thing today.

IV. SEARCHES IN THE PUBLIC SCHOOL SETTING SHOULD BE EVALUATED UNDER *NEW JERSEY v. T.L.O.*

Although this case involves a public school search, the Actons virtually ignore *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), the case that governs such searches.[3] Instead, the Actons attempt to draw unfavorable distinctions between this case and *Skinner* and *Von Raab*. Those cases do concern the same type of search involved here, suspicionless drug testing by urinalysis, and thus provide significant guidance on many aspects of this case.[4] But

[3] The Actons do argue that the Oregon courts have rejected *T.L.O.* (Resp. Br. at 32, n.21). In the case they cite, however, the court did not reach the issue of whether to follow *T.L.O. State ex rel. Juvenile Dep't v. DuBois*, 821 P.2d 1124 (Or. App. 1991).

[4] *Skinner* and *Von Raab* resolved several issues regarding urinalysis drug testing. The Court acknowledged the impracticability, if not impossibility, of detecting drug intoxication by observation, *Skinner*, 489 U.S. at 628-629, and established that urinalysis drug testing, properly designed to minimize privacy intrusions, is a reasonable means for detecting and deterring drug intoxication. *Von Raab*, 489 U.S. at 676. The Court also established that while

whether, under *Skinner* and *Von Raab*, preventing a broken collar bone or a fatal arrythmia on the football field is more or less "compelling" than preventing a bullet wound at the border. The issue here is whether the Policy was a reasonable and necessary way for the District to address the problem of student drug use.

V. THE VERNONIA ATHLETES WERE SUBJECT TO A SIGNIFICANT RISK OF SERIOUS INJURY

The first premise of the Actons' argument that the risk of injury is slight is that the District's athletes were not taking drugs. The concurrent findings conclude that the District had a drug problem involving athletes (Pet. Br. at 29, n.23), and many facts in the record support those findings. (Pet. Br. at 6-7). There is also evidence of at least one serious drug related sports injury. (J.A. 54-56). The small number of positive tests "does not impugn the program's validity" because "when the goal of the Policy is deterrence," a low detection rate "is more logically viewed as a hallmark of success." *Von Raab*, 489 U.S. at 674, 675, n.3.

Playing sports creates risks of injuries including broken bones, spinal injuries, brain damage and even death. (J.A. 70-72).[5] It is uncontested that athletes playing sports on drugs pose a "substantially greater risk" to themselves and other athletes. (J.A. 68-69; Resp. Br. at 45). The Actons nevertheless claim that Vernonia athletes are subject only to risk of injuries said to be "typical" in non-contact sports, i.e., pulled muscles and torn ligaments. The risks associated with playing sports while on drugs are significant even in "non-contact" sports because potential sports injuries are not limited to trauma. Cocaine use creates a "substantial risk for cardiac arrest" or a "fatal arrhythmia." (J.A. 72). Cocaine and amphetamines have an unpredictable effect on the heart which can cause death even for someone engaged in volleyball or track. (Def. Ex. 106 at 28); *See also*, Br. of Nat. Leagues of Cities, *et al.*, at 11-12.

[5] Even in the District's golf program, a student was struck by a ball and another was hit by a club. (J.A. 48).

The Actons say the negative effects of drug use the District describes are experienced by all drug users and if "generalized harm were sufficient to justify random drug testing, then *everyone* would be subject to urine testing." (Resp. Br. at 43). The negative effects the Actons describe, while perhaps common to all drug users, pose enhanced risks to athletes. Public schools bear a heightened responsibility for educating and protecting their students, especially when they have reason to believe student athletes are using illegal drugs.

VI. THE STUDENT BODY WAS DISORDERLY LARGELY BECAUSE OF DRUG USE

The Actons do not refute the concurrent findings of unusually severe classroom disorder and discipline problems which made it difficult for the teachers to educate. 796 F.Supp. at 1357 (Pet. App. B at 85a-86a). The Actons simply argue that drug use did not cause the problem and accuse the District of concluding "that every unruly student is unruly because of drugs." (Resp. Br. at 4). When students, including athletes, suddenly and uncharacteristically begin to act defiantly and belligerently, boast in the halls and classrooms about drug use, confess their drug use to teachers, act unusually in class and on the playing field, and are even arrested for drug use, it is reasonable to conclude that the behavior problems in general were drug related. Contrary to the Actons' assertion, what the teachers and administrators in Vernonia witnessed was not just students "generally act[ing] like juveniles." (Resp. Br. at 2).

The Actons attack the goal of maintaining order in the classroom because, "the government has no less interest in maintaining order and productivity in its workplace than in its schools." (Resp. Br. at 48). Establishing discipline and maintaining order are essential to effective education. Schools are populated by children and

"children at certain ages are inclined to test the outer boundaries of acceptable conduct and to imitate the misbehavior of a peer if that misbehavior is not dealt with quickly." *T.L.O.*, 469 U.S. at 352 (Blackmun, J., concurring). Schools therefore have an interest in maintaining order which surpasses virtually any employer of adults.

While an employer can simply fire disorderly employees, society expects teachers and administrators to do all they can to keep students in school. Suspension and expulsion, while available as a last resort, obviously hinder or terminate education and are frequently considered a sign of failure by the school. Thus, teachers and administrators have the unique and frequently contradictory goals of keeping students in school—even those who are troubled—and maintaining sufficient order to educate.

The Actons criticize the Policy for responding to classroom disorder by testing only athletes. (Resp. Br. at 48). Athletes in Vernonia were widely admired and were among the leaders of those using and glorifying drugs in the schools. (J.A. 20, 37). Juvenile drug use is driven by "peer pressure." (Def. Ex. 106 at 42-43, 45-46). The District therefore had good reason to believe that, in addition to achieving the primary goal of protecting athletes by deterring them from using drugs, the Policy would restore order and discipline by deterring drug use in the student population generally. Moreover, the District was advised by counsel that testing all extracurricular participants could jeopardize the validity of drug testing. (J.A. 30).

VII. DRUG INTOXICATION CANNOT BE RELIABLY DETECTED BY OBSERVATION AND THEREFORE DRUG TESTING IS REQUIRED

The detection of drug intoxication by observation of behavior is wholly unreliable. (J.A. 67-68). "The only standard [for determining drug impairment] is the drug test." (J.A. 67). This Court recognized that fact in *Skinner* and relied upon it to conclude that drug testing

is a reasonable and necessary means of detecting and deterring drug intoxication. 489 U.S. at 628-629. "[S]ince the gravamen of the evil is performing certain functions while concealing the substance in the body, it may be necessary . . . to examine the body or its fluids to accomplish the regulatory purpose." 489 U.S. at 633.

VIII. REASONABLE SUSPICION DOES NOT WORK

The inherent unreliability of detecting drug use by observation makes it uniquely difficult to obtain reasonable suspicion of drug intoxication. Reasonable suspicion requires "sufficient probability." *T.L.O.*, 469 U.S. at 346, *quoting Hill v. California*, 401 U.S. 797, 804 (1971). In the case of drug intoxication, observation simply cannot meet that standard.

Requiring teachers and administrators to develop reasonable suspicion of drug intoxication based on inherently unreliable observation would profoundly undermine drug use detection and deterrence in schools.[6] Some teachers and administrators would inevitably choose to abandon detection efforts altogether, rather than face the minuscule odds that their hunches about intoxication would be correct. Others would have to single out and accuse individual students. That would be far more embarrassing to students, disruptive of the school environment and destructive of the teacher-student relationship than random testing, especially since accusations based on observation will frequently be false. That method of detection would create a far greater "subjective" intrusion on privacy than the Policy. *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976), *quoting United States v. Ortiz*, 422 U.S. 891, 894-895

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[6] Drug education, of course, should continue, but it is far less effective. As Dr. Dupont explained, "just doing counseling, just doing education [sic] absent some test-based intervention will definitely not work to stop the drug use, or to defer [sic] it as preventative technique." (Def. Ex. 106 at 60).

(1975). "A teacher's focus is, and should be, on teaching and helping students, rather than on developing evidence against a particular troublemaker." *T.L.O.*, 469 U.S. at 353 (Blackmun, J., concurring).

IX. THE POLICY RESULTED IN A MINIMAL PRIVACY INTRUSION

A. Student Athletes' Expectations of Privacy Are Minimal as to Physical Conditions Which Could Endanger Them While Participating in Sports

The Actons admit that students generally "have less expectation[s] of privacy than adults in other settings." (Resp. Br. at 32). The Actons argue, however, that student athletes are not subject to regulations comparable to those governing railroad employees. They characterize the District's athletic regulations as "trifling." (Resp. Br. at 34).[7] But the Actons lose sight of two things. First, they ignore the pervasive regulation inherent in just being a student. "Of necessity, teachers have a degree of . . . authority over their students that is unparalleled except perhaps in the relationship between parent and child." *T.L.O.*, 469 U.S. at 348 (Powell, J., concurring). When the numerous rules imposed on athletes are considered in addition to the regulation inherent in being a student, it is readily apparent that student athletes are pervasively regulated.

The Actons also lose sight of the reason privacy expectations of those subject to pervasive regulation are minimal: such individuals "reasonably should expect effective inquiry into their fitness and probity." *Von Raab*, 489 U.S. at 672. Schools are uniquely responsible for the

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[7] Regulations requiring a physical exam, adequate insurance coverage or an insurance waiver, a minimum grade point average, school attendance on game days, travel to and from away games with the team and compliance with "any other rules of conduct established by the coach and athletic director, including rules related to dress, training hours and related matters" are hardly "trifling." (R. 61-62; Pl. Ex. 2 at 30).

health and safety of athletes, even more so when on notice of a serious drug problem involving student athletes. The only "effective inquiry" into the existence of drug intoxication is a drug test. Students who want to play sports in a school district with a serious drug problem should not be surprised when urinalysis drug testing is implemented to assure their fitness.

The Actons argue that the District cannot point to anything in its athletic rules that would prepare students for drug testing (Resp. Br. at 34-35). The Policy is part of the student handbook, to which all students have access, and is one of the "athletic rules." (Pl. Ex. 2 at 31). The Policy states clearly who will be tested, under what circumstances and why. (J.A. 7). Advance knowledge of the Policy clearly minimizes a student athlete's subjective expectations of privacy. *See, e.g., United States v. Biswell*, 406 311, 316 (1972) and *Donovan v. Dewey*, 452 U.S. 594, 600 (1981).

B. Student Athletes Have a Minimal Expectation of Privacy Because They Volunteered for Sports Knowing that They Must Submit to Drug Testing

The Actons admit that the Policy is less intrusive because it applies only to a voluntary activity. (Resp. Br. at 34-35). But they claim the intrusion "is still extreme" because the voluntary activity is school sports. In several suspicionless search cases finding a lesser expectation of privacy in part because of voluntary choice, the activity to be forfeited to avoid the search was of greater value than the privilege of playing interscholastic sports. *See, e.g., Skinner*, 489 U.S. 602; *Von Raab*, 489 U.S. 656; *New York v. Burger*, 482 U.S. 691 (1987); *Donovan*, 452 U.S. 594; *Biswell*, 406 U.S. 311.

C. The District Was Diligent and Successful in Its Efforts to Minimize the Privacy Intrusion

1. *Observation of student athletes during testing is minimal and is not an affront to reasonable expectations of privacy*

The Actons argue that *visual observation* during drug testing is particularly intrusive. (Resp. Br. at 29-30). There is no visual observation of females. With males, the monitors, when they pay attention,[8] see exactly what those standing in any line to use a public urinal see: the fully clothed back of an individual standing at a urinal. They do not observe the students' genitals or the act of urination itself. (J.A. 28, 42; R. 142). Typically, in both public and public school restrooms, males urinate while others wait in line immediately behind them—much closer than the 12 to 15 feet Vernonia monitors stand away from students. (R. 39-40, 138). Likewise, in public and public school restrooms for women, it is not unusual for others standing outside enclosed stalls to hear the sounds of urination. That is all the female monitors hear in this case.

It is true that those urinating in public restrooms usually are not monitored. But, students being monitored by teachers or coaches should not typically experience the level of embarrassment or intimidation an adult might feel being monitored by an employer. Monitoring is pervasive in most schools. Teachers monitor students in classrooms and halls, while they take tests and even as they dress and shower in locker rooms. One of the monitors testified that he goes through the boys' communal shower rooms "all the time and the kids are in the shower." (J.A. 28). In fact, "anybody walking through [certain doors in the dressing room] can see undress." He also said one toilet stall in that locker room has no door. *Id.*

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[8] One monitor testified that "most of the time" he finds something to work on while samples are being given because visual observation is "not a necessary thing that I have to do." (J.A. 31).

The Actons point to this Court's observation in *Skinner* and *Von Raab* that the privacy intrusion in the adult employment setting is lessened if the sample is given in an independent lab or clinic. But that is not so obvious when, as here, the setting is the familiar environment of the school locker room. Br. of Nat. League of Cities at 23 (citing authorities). Moreover, sending students to a medical facility to provide the sample (a five-minute procedure when performed in the locker room) would be disruptive of classroom education. (J.A. 31).

D. Student Athletes Voluntarily Accept Conditions at Least as Intrusive as the Policy

The Actons claim that children reasonably expect, and are expected, to urinate in seclusion. (Resp. Br. at 27). That simply does not comport with the realities of the public school environment. This Court may judicially notice that the average public school restroom rarely provides "seclusion." There is little seclusion for anyone using either a urinal or toilet in bathrooms in the District's schools.

Students who choose to play interscholastic sports must necessarily overcome any self-consciousness about their bodies. In most public schools across the country, including the District, probing and intrusive pre-season physical exams are required, and urinating, disrobing and showering in communal areas are daily facts of life.

1. *The Policy does not require students to "excrete on demand."*

The Actons assert that athletes are required to "excrete on demand." (Resp. Br. at 26). If they mean that students who wish to play interscholastic sports *must* provide a urine sample, it is true. In that sense, the employees in *Skinner* and *Von Raab* also were required to "excrete on demand." If, however, the Actons mean that some sort of physical or mental intimidation is part of the sample giving process, the record does not support

their assertion. Contrary to the Actons' claim that athletes are routinely taken from class to provide the sample (Resp. Br. at 29), athletes are allowed to provide the sample at a convenient time, whether during class, "at noon, after school, before school [or during] breaks." (J.A. 31). If a student cannot urinate at the time, they "go back to class and come to [the monitor] when they can." (J.A. 32).

2. The Policy is a minimal intrusion on student privacy even though it might detect drug use that does not take place during school

The Actons argue that the Policy is overly intrusive because it amounts to "round-the-clock surveillance" and might detect the student athlete's use of illegal drugs outside of class. (Resp. Br. at 31). The Actons acknowledge that this Court rejected such an argument in *Von Raab* due to the Customs Service's mission which requires "ensuring that [covered employees] do not use drugs off duty." *Id.* Public schools have a similar unique mission: teaching students, inculcating values essential to citizenship, including respect for authority and for the law, *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986), and assuring their safety. Drug use hinders learning by affecting motivation, concentration, understanding and even cognitive thought processes. (J.A. 73; R. 41-42). It also makes playing sports more dangerous. Moreover, drug use outside of school can result in impairment during school or athletic events. For all of these reasons, public schools have a compelling interest in deterring the use of illegal drugs by students at any time.

At the very least, schools should be allowed to prevent athletes from using illegal drugs during a sports season. It would be anomalous indeed if a coach could tell an athlete what to eat, when to go to bed, when and how to exercise, what protective clothing to wear, when to appear for practices and games and what grade point average to maintain, but could not forbid use of illegal drugs during the sports season.

3. There is no evidence that private medical information will be inappropriately gathered or disseminated by the District

While urinalysis *can* reveal private medical facts about a person, urinalysis performed under the Policy does not because it tests only for specified illegal drugs. (Pl. Ex. 5 at 17; Def. Ex. 109). There was no evidence that the District ever tested for legal drugs or to determine other physical facts about athletes. In fact, the consent form authorizes use of the specimen only "to test for drugs and/or alcohol use." (J.A. 10-11; Def. Ex. 109).

The policy requires students to verify use of prescription medications in order to explain positive test results. The testing procedure upheld in *Skinner* likewise required tested employees to disclose medications taken during the preceding 30 days. 489 U.S. at 626, n.7.[9] Because "there is no indication that the Government does not treat this information as confidential, or that it uses the information for any other purposes," this Court did not "view this procedure as a significant invasion of privacy." *Id., citing Whalen v. Roe*, 429 U.S. 589, 602 (1977). The same is true here.

4. The Policy is non-punitive

The Actons claim the Policy is punitive because there are sanctions for positive test results. Principal Aultman explained best what the District means by non-punitive:

> We wanted a policy that was not punitive. We're not—we did not want to go out and get kids. These are not bad kids that we're talking about that were on drugs and that were abusing. These are good

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[9] The Actons say it is not clear from *Skinner* that employees were required to indicate *which medications* they were taking. The record in *Skinner* shows that they were. The Field Manual governing the tests required the employee to fill out a form stating what "prescribed or over the counter" medicine he or she had taken as well as the date and time of the last dose. Field Manual, B-15, B-21 *cited generally at*, 489 U.S. at 626, n.7.

kids that were out of control with what was being taken. Our concern is with them too. So we did not want a policy, a policy that was punitive and was kick them out, get them out of here and be done with it, because we would not have had to do this program if we just wanted to expel kids.

So we wanted a prevention program and intervention program built into our drug testing system where there was buy-back, where we could get help if needed. We really wanted to do it from a non-punitive stance.

(J.A. 27-28). The Policy cannot be used to suspend or expel students. The most extreme sanction under the Policy is suspension from interscholastic sports. Students testing positive for drug use suffer no academic or criminal penalty.[10] Moreover, unlike the drug testing programs in *Skinner* and *Von Raab*, the Policy encourages participation in drug assistance programs.

As prestigious as school sports are in Vernonia, the loss of that privilege is far less significant than termination from employment, the sanction imposed in *Von Raab*. 489 U.S. at 663. If the Government can condition employment on refraining from illegal drug use, surely the District can condition participation in sports on the same.

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[10] The Actons note the Policy does not expressly prevent the District from divulging a positive sample result to law enforcement authorities. This Court rejected a comparable argument in *Skinner* because there was no evidence that information had been divulged and no one "seriously contend[ed] that this provision, or any other part of the administrative scheme, was designed as a 'pretext' to enable law enforcement officers to gather evidence of penal law violations." 489 U.S. at 621, n.5 *quoting New York v. Burger*, 482 U.S. at 716-717, n.27. Similarly, the record here does not reveal any intent to divulge test results to law enforcement or that any such disclosure was ever made. The Policy does not provide for such disclosure. The consent form limits release of results to the District and the parents and/or guardians of the student. (J.A. 10-11). The Actons have never claimed that the Policy was pretextual.

The Actons complain that other students might assume that one who is suspended from the sports program is a drug user. Surely schools are not required to abandon drug testing because a student may have trouble keeping his or her illegal drug use a secret.

X. THE POLICY PROVIDED A NECESSARY DETERRENT

The Actons do not refute the significant deterrent effect of drug testing recognized in *Skinner*. 489 U.S. at 630. Instead, they assert that drug testing is an unnecessary deterrent. They claim that the fear of getting caught is a sufficient deterrent. Yet even the threat of termination for drug use "cannot serve as an effective deterrent unless violators know that they are likely to be discovered." *Id.* However, the possibility that drug testing will occur at a time which cannot be predicted with certainty will "significantly increase the deterrent effect" of the Policy. *See, id.*

The desires to play well and to avoid injury also fail to deter drug use. Students using illegal drugs do not recognize that drug use might hurt their performance or lead to injury. They are usually in denial, so "they think they can control it." (Def. Ex. 106 at 60). In fact, drug users feel invincible and are less aware of pain. Instead of *avoiding* drugs to play better, many student athletes *use drugs* in hopes of playing better. (J.A. 84); *See also,* Br. of Nat. League of Cities, *et al.* at 17-19. A far more effective deterrent to drug use by student athletes is the risk of being unable to participate in sports at all. (Def. Ex. 106 at 61-62).

The Actons note that the Policy does not test for alcohol and steroids. The District need not show that the Policy was either the broadest deterrent possible or the least restrictive alternative. The choice between reasonable methods of search is left to the local government involved. *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 453-454 (1989).

The Actons argue that the Policy does not prevent athletes from playing in games while intoxicated by drugs. That is based on the faulty premise that it is only important to deter drug intoxication during games. It is equally important to deter drug intoxication during daily practices.

The Actons criticize the Policy for failing to show whether the level of illegal drugs in an athlete's system would cause "substantial impairment." Given the goal of protecting athletes from drug use through deterrence, it should not matter what level of an illegal drug is in a student's system unless one assumes that some level is acceptable. In any case, "a positive urine test is per se evidence of impairment at the time the test was taken." (Def. Exh. 106 at 55).

XI. THE ACTONS CONCEDE THAT THE POLICY WAS COMPLETELY RANDOM AND VESTED NO DISCRETION IN SCHOOL OFFICIALS

The district court found that the Policy adequately limited discretion and the court of appeals agreed that it "vests no discretion in any district officials." 23 F.3d at 1522 (Pet. App. A at 36a-37a); 796 F. Supp. at 1364 (Pet. App. B at 122a). The Actons do not contest these findings. As in *Von Raab*, these controls on government discretion narrowly and specifically define the permissible limits of the intrusion and thus protect personal privacy as would a warrant. 489 U.S. at 667.

XII. THE POLICY WAS EFFECTIVE

The court of appeals held that the Policy was effective:

> The Policy contributed to reaching the desired goal. Every teacher who testified had noticed an improvement in discipline, a reduction in disciplinary referrals, and a decrease in drug use and the glorification of drug culture since the Policy was implemented.

23 F.3d at 1522 (Pet. App. 34a). Moreover, the athletic director testified that athletic injuries decreased after the Policy was implemented. (J.A. 43).

The Actons find it unlikely that athletes who were taking drugs before the Policy was implemented quit immediately when testing started. (Resp. Br. at 7). Such behavior changes are not at all surprising. Potential loss of the privilege to play sports is a very powerful deterrent. (Def. Ex. 106 at 61-62); *see also* Br. of Nat. League of Cities, *et al.* at 14.

XIII. THE DIFFICULTY OF DETECTING DRUG USE BY OBSERVATION DOES NOT UNDERMINE THE EXISTENCE OF A DRUG PROBLEM IN THE DISTRICT

The Actons argue that if it is difficult to determine by observation whether a *particular person* is under the influence of drugs at a *particular time*, then the District could not conclude it had a serious drug problem involving athletes. It is possible, however, to determine the existence of a general drug problem—based on classroom essays and student conversations boasting of drug use, confessions of use by athletes, arrests of athletes for drug possession, unusual behavior on the playing field and rude, hostile and belligerent behavior in the classroom—without being able to develop a legally sufficient reasonable suspicion that the behavior of a particular adolescent at a particular time is attributable to drug use. For example, this Court noted in *Skinner* that the "railroads were able to detect a relatively small number of Rule G violations, owing, primarily, to their practice of relying on observation by supervisors and co-workers to enforce the rule." Yet "at the same time, industry participants . . . confirmed that alcohol and drug use [did] occur on the railroads with unacceptable frequency." 489 U.S. at 607-608.

XIV. THE DISTRICT'S INTERESTS IN ADDRESSING THE DRUG PROBLEM ARE SUFFICIENT TO ALLOW DRUG TESTING

The Actons distance themselves somewhat from the court of appeals' holding requiring the risk of some dramatic event resulting in immediate physical injury as a

prerequisite to drug testing. 23 F.3d at 1526 (Pet. App. 58a). Instead, they admit that individuals engaged in "less hazardous activities" may qualify for drug testing if there is evidence of frequent drug use within the group and if the potential harm is substantial. (Resp. Br. 44). The District established both of these.

In any case, one thing is certain: schools are in no better position to detect drug intoxication by observation or to deter drug use than the FRA or the Customs Service. Those who have access to drug testing will be able to detect and deter such use. Absent great luck, those who do not have access to drug testing will not. Our nation's schools should have access to the most effective tools available to address student drug use. Otherwise, "an important governmental interest" furthered by drug testing "would be placed in jeopardy by a requirement of individualized suspicion." *Skinner,* 489 U.S. at 624.

CONCLUSION

The District respectfully requests that the judgment of the court of appeals be reversed and the judgment of the district court in favor of the District be reinstated.

Respectfully submitted,

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